

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 04 September 2003

BALCA Case No.: 2002-INA-00167
ETA Case No.: P1997-CA-09060559/ML

In the Matter of:

RUBINO'S PIZZA,
Employer,

on behalf of



GUILLERMO MELARA,
Alien.

Appearance: Jean Pierre Karnos, Esquire
Santa Anna, CA

Certifying Officer: Rebecca Marsh Day
Los Angeles, CA

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. A. C. Pizza, Inc., doing business as Rubino's Pizza (Employer), filed an application for labor certification¹ on behalf of Guillermo Melara, (Alien) on April 7, 1997. (AF 10-62)² Employer seeks to employ the Alien as a restaurant cook/Italian specialty (DOT Code: 313.361-

¹ Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

² In this decision, AF is an abbreviation for Appeal File.

030).³ *Id.* This decision is based on the record upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal File, along with any written arguments. 20 C.F.R. § 656.27(c).

BACKGROUND

In its application, Employer described the duties of the position which it was seeking to fill as follows:

Cook, season and prepare a variety of Italian specialty dishes, pastas, specialty Italian salads and pizzas, fresh mustard, lemon grass and herb butter sauces on a daily basis. Responsible for food and quality control. Use kitchen equipment and utensils in addition to measuring and mixing various ingredients according to prescribed Italian recipes.

In the Notice of Findings (NOF), Dated September 17, 1999, the CO questioned Employer's requirement that applicants possess two years of prior work experience as a restaurant cook in order to qualify for the job opportunity. (AF 6-8) The CO observed that the documentation submitted indicated that Employer was a small business, with one full-time employee, the owner. The CO further observed,

[T]he menu indicates you serve pizza, sandwiches, and other quick food. The evidence shows, then, that you are not a full-service restaurant requiring a skilled foreign specialty cook. Therefore, you have a job opportunity for a specialty cook, ... an unskilled position, as defined by the Immigration and Control Act of 1990. The evidence indicates you are petitioning for a skilled worker, in order to avoid the cap on numbers of unskilled workers admitted to the United States.

(AF 7)

³ In this decision, DOT is an abbreviation for the Dictionary of Occupational Titles.

Accordingly, the CO found Employer's experience requirement to be unduly restrictive and, in a section labeled "Corrective Action," she gave Employer two options from which to choose. Employer could either (A) amend its application for labor certification by lessening its prior work experience requirement, and then readvertising its job opportunity, in order to test the labor market for potentially qualified United States workers; or (B) attempt to justify its experience requirement as a business necessity. In discussing how this justification could be accomplished, the CO stated:

The requirements cannot be merely for your convenience and personal preference. You must document that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform, in a reasonable manner, the job duties. Or you must submit documentation that the requirement is usual in the occupation/industry.

(AF 7-8)

In a rebuttal letter dated October 14, 1999, Employer attempted to establish the business necessity of its experience requirement. Asserting that this requirement bore "a reasonable relationship to the occupation" in the context of its business, Employer argued:

The employer is in need of a cook, Italian Specialty. The requirements of the position include seasoning and preparation of a variety of Italian specialty dishes. Such dishes include pastas, specialty Italian salads, calzones, and sandwiches. The employer requires that those foods be prepared with special recipes. Use of specialty recipes is evident in the creation of the house pizza. The employer specializes in making unique pizzas. The employer requires that the pizzas are topped with homemade sauce made from the employer's own special recipes. Considering these factors, the employer requires a cook with a minimum of two years experience who is familiar with the recipes used by the employer.

(AF 04)

Employer also contended that two years of experience in making Italian specialty dishes was

“essential to perform, in a reasonable manner, the job duties.” To support this contention, Employer stated:

The employer provides food and restaurant service to dine-in customers, take-out/deliveries, and caters for banquets. Since 1976, the employer's business accommodates forty-five customers who dine in the restaurant. The employer also serves food to many customers by delivery. The employer's products are made to order with special care administered during the preparation of the food. Therefore, the applicant for the position must be knowledgeable and have experience preparing Italian specialty foods for the employer to maintain its reputation as a server of quality food products. ...

(AF 04-05)

The CO issued the Final Determination on January 7, 2000. (AF 02-03) After observing that making calzones was not a job duty which was specifically listed by Employer in its application, the CO stated:

In sum, your rebuttal reinforces the NOF position that this is a Specialty Cook position: if the owner has his own recipes, the cook has only to follow them in accordance with the duties normal to this occupation. There is no mention of the special skills required of a Foreign Specialty Cook: "Plans menus... portions and garnishes food... serves food to waiters on order... estimates food consumption and requisitions or purchases supplies." Therefore, your terms and conditions of employment are excessive and do not comply with regulations and your petition is denied.

(AF 03)

On January 11, 2000, Employer requested review by this Board, asserting, without elaboration, that:

The particular grounds on which the request is based are that the requirement of two (2) years prior work experience is not restrictive and is reasonable. In addition the business is a full service restaurant and business is a durable one for which an experienced cook is needed.

(AF 01) The case was docketed by the Board on January 29, 2002, and Employer did not file an additional brief in support of its appeal.

DISCUSSION

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. An employer cannot use requirements that are not normal for the occupation or are not included in the DOT unless it establishes a business necessity for the requirement. The purpose of section 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Rajwinder Kaur Mann*, 1995-INA-328 (Feb. 6, 1997).

Employer can establish a business necessity by showing that (1) the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and (2) the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer. *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989)(*en banc*). Employer may not require any more strict requirements than are listed in the DOT classification for the job. *Approach, Inc.*, 1990-INA-230 (Aug. 29, 1995).

The CO has challenged Employer's classification of the position under the DOT, and Employer has objected to the re-classification made by the CO. It is well established that the DOT is a flexible document, and that it should not be applied mechanically. *Lev Timashpolsky*, 1995-INA-33 (Oct. 3, 1996). Using the DOT as an "occupational guideline" is necessary as the DOT is unable to list every job opportunity within the United States. Thus, the DOT must be utilized in a fashion which supports the intent of the law, and provides a flexible framework which must then be analyzed "in the context of the nature of Employer's business and the duties of the job itself."

Trilectron Indus., 1990-INA-188 (Dec. 19, 1991). As a result, it has been held that the CO may challenge, *inter alia*, the employer's classification of a particular position. *Downey Orthopedic Medical Group*, 1987-INA-674 (March 15, 1988)(*en banc*).

Employer's menu is, as the CO noted in the NOF, of a limited nature such that six months to a year of combined training, education and experience should be sufficient. The menu Employer provided indicates it is a "dine in" or "carry out" facility. Dinners consist primarily of simple spaghetti dishes, and other Italian dinners, pizzas, calzones, sandwiches (both hot and cold), and salads, all of which are normally seen in casual American dining. Other items listed include party sandwiches (sold by the foot), meat trays, party platters, and larger servings of salads and Italian main dishes such as lasagna, manicotti, rigatoni, and mostaccioli, which serve anywhere from ten to twenty-five people. These are not menu items which would require two to four years of experience to learn to prepare, nor has Employer provided compelling rebuttal establishing otherwise.

The DOT indicates, in pertinent part, that a Cook, Specialty, Foreign Food plans menus and cooks foreign-style dishes, dinners, desserts, and other foods according to recipes. The cook prepares meats, soups, sauces, vegetables, and other foods prior to cooking, and serves food to waiters on order. As the NOF points out, Employer has not established that the position requires the elaborate preparation of foods as set forth in the job description of a Cook, Specialty, Foreign Food, especially since none of the three recipes submitted by Employer were shown to be complex or difficult to prepare. Thus, the position being offered by Employer more closely resembles that of a Cook, Specialty, which requires six months up to and including one year of combined education, training and experience, and involves the preparation of specialty foods, such as fish and chips, tacos and pastries, and involves serving customers at a window or a counter. In this respect, there was no indication from Employer that his restaurant is a sit-down establishment with waiters. What the menu does show is that it is a carry-out, dine in establishment with free delivery for orders over ten (\$10.00) Dollars. The foods prepared are not elaborate, and indeed have become standard American fare.

Employer has failed to provide sufficient evidence to rebut the re-classification of the position as suggested by the CO. It has also failed to establish a business necessity for the experience requirement, having failed to demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of Employer's business and are essential to perform, in a reasonable manner, the job duties described by Employer. Employer did not offer to reduce the requirements to the DOT standard. Labor certification therefore was properly denied, and the following order shall issue.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses,

if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.